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In the Supreme Court of the United States

OCTOBER TERM, 1965

No. 1020

W.W.I.Z., INC. AND SANFORD A. SCHAFITZ, PETITIONERS

v.

FEDERAL COMMUNICATIONS COMMISSION

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE FEDERAL COMMUNICATIONS COMMISSION IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. 1A–12A) is reported at 351 F. 2d 824. The decision of the Federal Communications Commission is reported at 36 F.C.C. 561, and its Memorandum Opinion and Order denying petitions for reconsideration appears at 37 F.C.C. 685.

JURISDICTION

The judgment of the court of appeals was entered on September 8, 1965. A timely petition for rehearing *en banc* was denied on November 19, 1965. The petition for a writ of certiorari was filed on February 15, 1966. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether the Federal Communications Commission's finding that a broadcast licensee had transferred control of his station to another without Commission approval was supported by substantial evidence.

2. Whether the Commission's findings that control had been transferred without its approval, that false and misleading statements had been made concealing this transfer, and that the licensee had violated various technical regulations supported its decision to deny the licensee's renewal request.

3. Whether the Commission applied the proper standards in denying petitioners' application for renewal of a broadcast license.

STATUTE INVOLVED

Section 310(b) of the Federal Communications Act, as amended, 48 Stat. 1086, 47 U.S.C. 310(b), provides:

> § 310(b) No construction permit or station license, or any rights thereunder, shall be transferred, assigned, or disposed of in any manner, voluntarily or involuntarily, directly, or indirectly, or by transfer of control of any corporation holding such permit or license, to any person except upon application to the Commission and upon finding by the Commission that the public interest, convenience, and necessity will be served thereby. * * *

STATEMENT

In May 1958, petitioner Schafitz was issued a license to operate a standard radio broadcast station in Lorain, Ohio. 24 F.C.C. 363. Petitioner's application

for renewal of that license was filed on June 5, 1961, and was denied by the Federal Communications Commission after an evidentiary hearing on March 25, 1964. The court of appeals unanimously sustained the Commission's decision.

The Commission's decision was based on findings that petitioner Schafitz had allowed control of the station (WWIZ) to pass to the Lorain Journal without receiving Commission consent, as required by Section 310(b) of the Communications Act (47 U.S.C. 310(b)), that he had misrepresented material facts regarding the transfer and that the station had failed to observe a number of technical rules governing broadcast station operation.

The relevant evidence before the Commission may be briefly summarized: In September 1958, Schafitz was approached by Harry Horvitz, president of the Lorain Journal Company ("Journal"), and informed that the Journal desired to acquire a financial interest in WWIZ (R. 185).[1] Because Schafitz was experiencing financial difficulties in completing construction of a UHF station in Youngstown, Ohio, for which he had also received an FCC license, Schafitz was receptive to the suggestion; but he needed $55,000 and the Journal was unwilling to pay that amount for a minority interest. The parties ultimately agreed upon a plan under which Schafitz would organize a corporation, authorized to issue both common and preferred stock, and the Journal would hold 45 per-

[1] "R." refers to the printed Joint Appendix filed in the court of appeals.

cent of the common stock and all of the preferred stock (R. 185–186).

On September 18, 1958, Schafitz filed with the Commission an application for assignment of the WWIZ construction permit to a corporation in which he, so far as the Commission was advised, was to be the sole shareholder (R. 186). The application form required "a full narrative statement of the circumstances leading to the assignment (or transfer) and the reasons therefor" and Schafitz stated as follows (R. 185–186):

> This is an application to change from an individual permittee to a corporation permittee. All of the stock of the corporation is held by the present permittee, Sanford A. Schafitz. No other stockholders or persons are involved in the ownership of the new corporation. The assignee is WWIZ, Inc., an Ohio corporation. It is authorized for 200 shares, of which 110 will be issued to Sanford A. Schafitz, and 90 will remain in the Corporation.
>
> The purpose of the assignment to a corporation is to take advantage of its legal rights and privileges which are well known to the law.

Another part of the application form required the submission of "all contracts, agreements, or understandings by which the stock (other interest) is transferred," and Schafitz replied that there were none (R. 187). In response to a Commission letter requesting further information about the proposed transfer,

Schafitz represented to the Commission that the station would be constructed and operated with funds supplied by him alone. A projected balance sheet of the corporation attached to his reply did not reveal the added capital which would result from the sale of stock to the Journal, although a note at the end of the balance sheet stated "[i]f additional financing is desirable, the corporation may sell up to 90 shares of Voting stock" (R. 188).

Shortly after the Commission approved the assignment of the WWIZ construction permit to the new corporation, Schafitz and Horvitz agreed upon the final details of its corporate structure.

The articles of incorporation and "code of regulations" provided, among other things, that (1) the preferred shareholders were to receive a 6 percent cumulative dividend and were to share equally with the common shareholders in any further dividends;[2] (2) there were to be three directors, serving three-year terms and removable only by two-thirds of the shareholders; (3) checks were required to bear two signatures, one representing the "minority interest"; (4) the owner of 25 percent of the common stock could call a shareholders' meeting; (5) the articles and code could be amended only by a two-thirds vote of the common stock (R. 188–190).

On November 12, 1958, the first meeting of the WWIZ shareholders was held in the offices of the

[2] With the Journal holding all of the preferred stock and 45 percent of the common, this provision would result in the Journal's receiving 72.5 percent of any dividend declared in addition to its preferred dividend.

Lorain Journal. A Journal employee acted as secretary and kept the minutes (R. 191). The three directors elected were Schafitz, Horvitz, and William G. Wickens, a Lorain lawyer who had performed legal work for the Journal and who was suggested as a director by Horvitz (*ibid.*). Also on November 12, 1958, the Journal and Schafitz entered into a formal contract whereby the 200 preferred shares were issued to the Journal in exchange for $20,000 and the Journal agreed that no later than January 10, 1959, it would purchase 90 common shares for $36,000 (R. 191–192).[3] The transactions by which the Journal acquired 100 percent of the preferred stock and 45 percent of the common stock were reported to the Commission as required by the Commission's rules (47 C.F.R. 1.613, 1.615), but no application for transfer of control to the Journal was filed until June 1961, when the Journal contracted to acquire from Schafitz the remaining 110 shares of common stock (R. 193–194, 200).

The Commission's hearing examiner concluded that the powers assigned to the Lorain Journal under the agreement between Schafitz and Horvitz amounted merely to precautions taken by a minority owner (*i.e.*, the Journal) to "safeguard its legitimate financial interests" (R. 166). The Commission reversed the examiner. It concluded that the Journal's fiscal control—its physical possession of the books and records and the countersigning of all checks—"resulted in

[3] This transfer date was selected in order to afford Schafitz a tax advantage.

control passing to the Journal by means of its hold on the corporation's pursestrings" (R. 214). The Commission also disagreed with the examiner's conclusion that the third director—Wickens—was an independent controlling force with regard to the station's affairs; it found that his participation had been "extremely *pro forma*" (R. 213). In addition, the Commission determined that Schafitz had abandoned the day-to-day operation of the Lorain station and had devoted his personal efforts principally to the UHF station in Youngstown (R. 215–216).[4] Finally, the Commission determined that there had been violations of its technical broadcasting rules, such as those requiring the full-time presence of a first-class radiotelephone operator, the maintenance of logs recording periodic readings of equipment meters, and the prompt discontinuance of remote operations whenever remote meters fail to function properly (R. 217–218). In light of all these circumstances, the Commission denied the renewal application.

The court of appeals found that evidence supported the Commission's conclusion and that the Commission had given due weight to the examiner's findings. It held that the Commission acted within its broad discretion in determining that the licensee's misconduct was sufficiently serious to warrant denial of the renewal application.

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[4] The Commission recognized that there was no evidence in the record to indicate that the Journal had taken up the day-to-day operation of the station, but there was evidence to show that Schafitz had been devoting no time at all to it by May 1960 (R. 215).

ARGUMENT

1. The evidence, which we have briefly summarized above (pp. 3–7, *supra*), was plainly sufficient to sustain the Commission's conclusions that actual control had been transferred from Schafitz to the Lorain Journal without consent of the Commission and that misrepresentations had been made regarding the purpose of the change from individual to corporate ownership. There is no substance whatever to petitioners' assertion that the Commission failed to find that control was actually transferred; its opinion clearly manifests its conclusion that control was transferred.[5] The passage quoted by petitioners (Pet. 3, 7) refers to the absence of any specific evidence proving affirmatively that the Journal was in charge of day-to-day operation of the station. But the Commission properly drew the inference that the Journal was in control from other evidence in the record, and its ultimate conclusion in that regard emerges clearly from a reading of its opinion.

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[5] See, *e.g.*, the following: "In our view, Schafitz took the first step in the pattern which led to the ultimate divestiture of control when * * *" (36 F.C.C. at 580). "There can be no question that this relinquishment [of control] is evident with respect to the operation of the station * * *" (*id.* at 583). "* * * [O]ur findings and * * * conclusions * * * demonstrate (1) that control of WWIZ, Inc., was transferred to Lorain Journal without the prior consent of the Commission, and (2) that the Lorain Journal has, without such prior consent exercised this control." (*Id.* at 584). "In light of the unauthorized transfer of control * * * from Sanford A. Schafitz to the Lorain Journal [and], the exercise of such control by the Journal * * *" (*id.* at 585).

Nor were the hearing examiner's conclusions improperly disregarded. As the court of appeals observed, the Commission "did study and address itself to the salient conclusions and reasoning of the Examiner" (Pet. App. 6A). The critical issues in this proceeding were not questions of credibility. The Commission did not reverse the examiner on factual questions but on the conclusions and inferences to be drawn from the largely undisputed facts. This was properly within the province of the agency under this Court's decision in *Universal Camera Corp.* v. *National Labor Relations Board,* 340 U.S. 474, 496.

2. Petitioners contend that even if Schafitz improperly transferred control, the Commission could not refuse to renew his license because (1) Congress provided no specific penalty for transfers of control in violation of Section 310(b) and intended that the section be enforced only through "reprimands, short-term renewals, fines, temporary authority, and cease and desist orders" (Pet. 11) and (2) the denial of a license renewal is, in effect, the revocation of a license and may be imposed only under the procedure established by the Act for revocations (Pet. 9). Both of these contentions are unsound. The Commission did not, in this case, deny the renewal application *as a penalty* for any violation of the statute or the Commission's rules. It exercised the duty specifically conferred upon it by statute to determine whether the "public interest, convenience, and necessity will be served" by a renewal of the license (47 U.S.C. 307

(d), 309(a)) and determined that since there had been an unauthorized transfer of control by Schafitz which had been concealed by misrepresentations to the Commission, the public interest would not be served by renewing Schafitz's license. *Federal Communications Commission* v. *WOKO, Inc.*, 329 U.S. 223; *Immaculate Conception Church of Los Angeles* v. *Federal Communications Commission*, 320 F. 2d 795 (C.A.D.C.), certiorari denied, 375 U.S. 904; *Robinson* v. *Federal Communications Commission*, 334 F. 2d 534 (C.A.D.C.), certiorari denied, 379 U.S. 843.

Nor did the Commission's decision rest solely upon petitioners' violation of Section 310(b). The Commission's opinion also emphasized Schafitz's filing of misleading statements (R. 210–211, 219) which violated the duty of candid disclosure imposed on licensees. As the court of appeals observed, these delinquencies were not cured by petitioners' filing of routine ownership reports required by Section 1.615 of the Commission's rules, 47 C.F.R. 1.615 (Pet. App. 9A).

Petitioners' contention that the Commission was obliged to act as if it were proposing to *revoke* a license under 47 U.S.C. 312 was never asserted during the Commission proceedings and is unavailable, in the first instance, on judicial review. 47 U.S.C. 405. Cf. *Unemployment Compensation Commission of Alaska* v. *Aragon*, 329 U.S. 143, 155; *Federal Power Commission* v. *Colorado Interstate Gas Co.*,

348 U.S. 492, 498–499. In any event, the argument is without merit. The Communications Act distinguishes between the denial of an application for license renewal and the revocation of a license (47 U.S.C. 307(d)) and this demonstrates that Congress did not intend to make the two identical. The order-to-show-cause procedure of 47 U.S.C. 312(c) and the burden-of-proof allocation of Section 312(d) are expressly applicable only to revocation proceedings and it would be inconsistent with the statutory scheme to extend them to renewal applications. *Pinson* v. *Federal Communications Commission,* 321 F. 2d 372 (C.A.D.C.).

3. The Commission applied the proper standard in denying the renewal application. The misrepresentations here were, in certain respects, more serious than those in *Federal Communications Commission* v. *WOKO, Inc.,* 329 U.S. 223, on which petitioners rely (Pet. 13). In that case it was conceded that the misrepresentation engaged in by the licensee had not "influenced the Commission in making any decision" (329 U.S. at 226–227); the licensee had merely concealed a minority interest. In the present case, on the other hand, the misrepresentation dealt with changes in station ownership which required Commission approval. Consequently, the Commission was fully justified in concluding that it would not be in the public interest to grant the license renewal.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted.

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MARCH 1966.

U.S. GOVERNMENT PRINTING OFFICE: 1966